

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID HUTTON,
Plaintiff,

v.

CITY OF MARTINEZ, ET AL.,
Defendants.

No. C 02-1606 CRB (JL) **E-FILING**

ORDER

Granting Docket # 65

Background

On April 6, 2001, Defendant Roger Ray, a Martinez police officer, shot Plaintiff David Hutton in the back. Plaintiff contends that Ray, who claims he saw Plaintiff reaching for a gun, in fact shot him because the officer was in such poor physical condition that he was incapable of pursuing Plaintiff on foot. In fact, Ray had surgery after the incident. He went on temporary disability from April 8, 2001 through May 1, 2002 and took a disability retirement effective May 2, 2002. Plaintiff filed suit in this District April 3, 2002 for violation of his civil rights under 42 U.S.C. §1983.

Discovery Dispute

Plaintiff's counsel received a copy of the post-shooting transcription of Ray's statement and noticed that he mentioned severe back pain and neck pain in the course of the interview. During Ray's deposition in this case, on February 24, 2003, Plaintiff's

1 counsel attempted to ask him about his physical condition the day of the shooting. He
2 asked Ray about his back surgery, his subsequent disability and his retirement from the
3 Martinez Police Department. Counsel for Ray objected on the basis of the physician-patient
4 privilege and Ray's privacy, and instructed Ray not to answer. Ray did testify, however, that
5 he was not experiencing any back pain on the day of the shooting and was able to run.

6 Plaintiff then propounded discovery requests to both the City and Ray to obtain
7 documentary evidence of Ray's physical condition the day of the shooting. Defendants
8 provided some documents and interrogatory responses, but the worker's compensation
9 carrier, Contra Costa County Municipal Risk Management Insurance Authority
10 ("CCCMRMIA"), declined to produce the worker's compensation file or medical records
11 relevant to Ray's work-related back injury from his treating physician, Dr. Nottingham. Ray
12 has also not testified at deposition regarding his back injury, his back surgery and his
13 subsequent disability and retirement.

14 On April 28, 2003, Plaintiff noticed and served a subpoena for the deposition of Lisa
15 Poirier, the claims person handling Ray's worker's compensation claim. Plaintiff requested
16 that she bring Ray's file to the deposition. May 13, 2003, Alan Cohen, counsel for
17 CCCMRMIA, advised Plaintiff's counsel by letter that he believed Ray had a privacy
18 interest in his medical records and that the records would not be disclosed without Ray's
19 authorization. At Ms. Poirier's deposition on May 29, 2003, Defendants' counsel instructed
20 her not to answer any questions regarding Ray's worker's compensation file on the basis of
21 Ray's right to privacy and the Health Insurance Portability and Accountability Act. ("HIPAA")
22 The claims file was not produced.

23 The parties met and conferred by letter over a period of time and in person on May
24 29, 2003 to attempt to resolve this dispute.

25 On June 11, 2003 the parties submitted their Joint Statement to the Court regarding
26 their dispute over Ray's deposition and his medical and worker's compensation files. On
27 July 24 2003 this Court issued an order pursuant to the decision in the *Soto* case that
28 Defendants produce both the medical records and the worker's compensation file for

1 Roger Ray to the Court for in camera review. (Docket # 62) The files were submitted to the
2 Court on August 20, 2003. The Court reviewed all the documents in both files.

3 **Legal Analysis**

4 Plaintiff contends that Ray's records are relevant to the issue of whether Ray's back
5 injury caused him to shoot Plaintiff, rather than run after him. Plaintiff contends that whether
6 Ray was physically capable of performing his duties adequately and safely is relevant to
7 whether Ray was trained to use less aggressive methods of force to subdue Plaintiff. *See,*
8 *e.g. Parker v. District of Columbia*, 850 F2d 708 (D.C. Cir. 1988). ("Given Officer Hayes'
9 physical condition, it is not hard to fathom that his most effective method for subduing the
10 objects of his pursuits would be the use of a firearm as opposed to the application of
11 physical force. This condition posed a foreseeable risk of harm to others") *Id.* at 713. If Ray
12 was unable to pursue Plaintiff on foot, due to his back injury, he may have decided to shoot
13 him instead.

14 Plaintiff also contends the deposition testimony and documents are also relevant to
15 whether the City of Martinez properly trained, supervised and retained Ray. ("We are
16 persuaded that a fair-minded jury could have concluded that Officer Hayes' conduct was
17 the result of deliberate indifference on the part of the District with respect to the physical
18 training of its police officers.") *Id.* at 714.

19 Defendants distinguish the *Parker* case as dealing solely with inadequate training for
20 an officer on how to physically restrain a subject. They contend that any disclosure should
21 be limited to the day in question and Ray's condition at that time. They also assert
22 Defendant's privacy rights in the documents and his personal medical information.

23 CCCMRMIA relies on the Health Insurance Portability and Accountability Act
24 ("HIPAA") to justify withholding Ray's worker's compensation and medical files.

25 CCCMRIMIA asserts its duty to protect Ray's privacy, since he objects to producing the
26 records to Plaintiff, and it has no power to waive his privacy rights.

27 **Conclusion and Order**

28

1 The privacy interest in one's confidential medical records is conditional and a limited
2 impairment of the right may be allowed if properly justified. *Soto v. City of Concord*, 162
3 F.R.D. 603, 618 (N.D.Cal.1995) (calling for in camera review of records).

4 Assertions of privileges in federal question cases are governed by federal common
5 law (Rule 501, Federal Rules of Evidence). The physician-patient privilege is not
6 recognized by federal common law, federal statute, or the U.S. Constitution. *Soto, Id.*
7 Where application of state law would be clearly inconsistent with federal law, state law
8 privileges do not apply. See, e.g. *Pagano v. Oroville Hosp.*, 145 F.R.D. 683, 688 (E.D.Cal.
9 1993). [*Pagano* relies heavily on Judge Brazil's discussion of the intersection between
10 federal discovery and state privilege laws in *Kelly v. City of San Jose*, 114 F.R.D. 653
11 (N.D.Cal. 1987), as well as numerous cases from other districts.]

12 Therefore, Ray may not rely on the physician-patient privilege or medical records
13 privilege to withhold records. Nor may he rely on a right of privacy, since this right is only
14 available explicitly under the California Constitution and may be abrogated where justified
15 under federal law. *Soto, Id.* The Court must balance Ray's privacy rights against Plaintiff's
16 need for the information.

17 This Court finds that the information in Ray's medical records and worker's
18 compensation file is directly relevant to his physical condition on the day of the shooting. It
19 is unrealistic to limit discovery to the day in question because of the possible cumulative
20 effect of injuries over time. The information in the files could also support or contradict
21 Ray's testimony that on the day of the shooting he was not suffering from any pain which
22 would have affected his ability to pursue Plaintiff or which would have motivated him to
23 shoot Plaintiff rather than chase him.

24 The Court finds the decision in *Parker* persuasive because it involved the Police
25 Department's duty both to train its officers and also to monitor their physical condition to
26 assure their fitness for duty. In the case at bar, if Ray was unable to pursue a fleeing
27 suspect due to his physical condition, it could lead to a conclusion that the Martinez Police
28

1 Department did not adequately train its officers to assure that their physical condition was
2 adequate for the performance of their duties.

3 CCCMRMIA relies on the Health Insurance Portability and Accountability Act
4 ("HIPAA") to justify withholding Ray's worker's compensation and medical files. However,
5 Section 164.508 subsection (e) of HIPAA allows disclosure of information in the course of
6 judicial and administrative proceedings. Disclosure may be compelled in response to a
7 court order or to a subpoena, discovery request, or other lawful process, even if not
8 accompanied by a court order, if the party seeking the information makes reasonable
9 efforts to secure a qualified protective order. (Section 164.508 (e)(1) (I) and (ii)(A) and
10 (ii)(B)). Plaintiff has attempted to obtain the information by both subpoena and discovery
11 request, and the parties have agreed to a protective order.

12 The Court finds that HIPAA does not preclude production of the medical records and
13 worker's compensation files in response to either a discovery request, subpoena or this
14 Court's order, under an adequate protective order. There is already a protective order in
15 this case, which adequately safeguards the defendant's privacy. Accordingly,

16 It is hereby ordered that Defendants shall produce to Plaintiff within 20 days of the
17 date of this order the medical file and the worker's compensation file which were reviewed
18 by the court. Identifying information such as Ray's Social Security number, home address
19 and the identity of any family members shall be redacted. In addition, Ray may be
20 questioned at deposition regarding the contents of these files and his physical condition
21 and medical treatment. Ms. Poirier may be questioned regarding the contents of the files.

22 IT IS SO ORDERED.

23 DATED: October 27, 2003

24 //s//

25 JAMES LARSON
26 United States Magistrate Judge

27 N:\post\ord-10-22-2003.wpd
28